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No. 535

In the

Supreme Court of the United States

OCTOBER TERM, 1953

WILLIAM J. ROCHELLE, JR., Trustee,
LIBERTY BROADCASTING SYSTEM, INC.,
No. 4333 in Bankruptcy,

Petitioner,

v.

HAL SHIDELER,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

William J. Rochelle, Jr., Trustee of Liberty Broadcasting System, Inc., Bankrupt, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Cirtuit, entered in the above entitled case on September 9, 1953, rehearing denied October 26, 1953, reversing the judgments of the United States District Court for the Northern District of Texas.

OPINIONS BELOW

The opinion of the District Court (Turnover order, R. 21-22, Contempt order, R. 239-240) is unreported.

The opinion of the Court of Appeals (R. 262-267) is reported in *207 F. 2d 95.*

JURISDICTION

The judgment of the Court of Appeals was entered on September 9, 1953 (R. 268). Petition for rehearing was filed September 30, 1953 (R. 269), and denied on October 26, 1953 (R. 273). The jurisdiction of this Court is invoked under the provisions of *Section 24(c) of the Act of June 25, 1948, c. 646, 62 Stat. 928, 11 U. S. C. Chapter 4, Sec. 47.*

QUESTION PRESENTED

Whether a turnover order will lie against an agent of a Trustee in Bankruptcy for funds of the Bankrupt estate when the Referee and District Judge have held that the agent did not satisfactorily go forward with proof to negate the presumption arising from recent possession, where the relator met the evidence of recent possession with only a nearly naked denial, and where the Referee and District Judge found the relator's testimony to be incredible in context.

STATEMENT

The Liberty Broadcasting System, Inc., was adjudicated a bankrupt May 28, 1952. William J. Rochelle, Jr., Trustee, filed his application for a turnover order against Hal Shideler on July 17, 1952, for $11,722.50 which fund was an asset of the bankrupt estate acquired after bankruptcy by the relator as agent of the trustee. (R. 1-3.) The bank-

rupt had entered into a contract with Amana Refrigeration, Inc. (R. 35-36.) Amana Refrigeration, Inc., cancelled its contract with Liberty Broadcasting System, effective April 30, 1952 (R. 37, 106). At that time, a dispute arose as to the amount due thereunder (R. 41, 43). An agreement was reached between Benton Paschall and Hal Shideler for the bankrupt and M. E. Morris, advertising manager of Amana Refrigeration, Inc., for Amana to pay $15,000 in full satisfaction and release of the debt (R. 46-49, 228-229). To complete the settlement Shideler asked for a release from the Trustee to Amana (R. 50). This was contained in a letter from Rochelle, Trustee, dated June 20, 1952 (R. 52), with a certified copy of the order of the Referee authorizing the compromise of the indebtedness and a letter directing remittance of $11,722.50 of the $15,000 to the Trustee (R. 52-55, 224), which release with instructions were delivered by Paschall to Shideler's home, Sunday, June 22, 1952, and received by Shideler and his wife the next day, June 23 (R. 53-56) and transmitted by them to Amana (R. 46-51, 202, 208-209). Amana delivered its check for $15,000.00 to Shideler June 25, 1952 (R. 209, 211). Shideler deposited the check in the Citizens National Bank, San Bernandino, California, to his personal account (R. 168-169, 196) and has at all times refused to deliver any portion thereof to the Trustee. (R. 149-150.) On October 2, 1952, Shideler admitted he had between $2,000.00 and $3,000.00 of this money still in his possession (R. 152). On October 9, 1952, the last day of the hearing he admitted he had a few hundred dollars, specifically, $1,090.00 (R. 201). The turnover order was issued by the Referee

the next day, October 10, 1952 (R. 11-15) and the Referee found as fact, that Shideler was "holding" the fund. The certificate of contempt was issued by the Referee November 10, 1952 (R. 17-19). The order of the District Court on petition for review affirming the turnover order was entered November 19, 1952 (R. 21-22), and the District Court's order adjudging Shideler in contempt was entered December 1, 1952 (R. 239-240). On the contempt hearing in the District Court, Shideler filed his affidavit admitting possession of $3,800.00 in cash and in banks at that time. (R. 239.)

REASONS FOR GRANTING WRIT

1. The decision of the Court of Appeals was contrary to a decision of the Supreme Court.

In *Maggio v. Zeitz, 333 U. S. 56*, the Supreme Court, at pages 75 and 76, in speaking of the relator's burden when met with the proved fact of recent possession, said:

> "Of course, if he offers no evidence as to his inability to comply with the turnover order, or stands mute, he does not meet the issue. Nor does he do so by evidence or by his own denials which the court finds incredible in context."

Here Shideler's defense was merely in effect, "I have but a little of it left. I spent it. I paid bills with it."

There was no accounting—no cancelled checks—no receipts—no transcripts of bank records—no listing of expenditures—no satisfactory evidence whatsoever and the point to be emphasized is that the fact finder did not believe the meager testimony offered. (R. 255-257.)

It is submitted that the decision of the Court of Appeals, if allowed to stand, will be a tip-off to would be converters of bankrupt funds that they will not have the burden to account, but need only say "I spent it" to escape the consequences of a turn-over proceeding.

It is not believed that the Supreme Court intended any such result by its decision in *Maggio v. Zeitz*, supra.

The rule is quoted in *Brune v. Fraidin, 149 F. 2d 325 (4th Circuit, 1945)*, to the effect that the difficulty of proof of present possession has been met by the courts with the presumption that the bankrupt still has the assets if possession is once shown and the burden shifts to him to show inability to comply.

The case of *In re Standard Coal Mining & Converters Corp., 178 F. 2d 819 (7th Circuit, 1949)*, is a case much in point. There also the testimony of Brock and Becker was found by the trial court to be vague, uncertain, and unsatisfactory, especially as to the exact nature and amount of assets formerly owned by them. The Court of Appeals held that the trial court had the opportunity to observe appellants on the witness stand and must, therefore, accept his judgment as to their credibility.

In effect, the holding of the Court of Appeals in the case at bar is an attempt to modify the presumption of present possession to a much greater degree than was clearly intended by this Court in the case of *Maggio v. Zeitz, 333 U. S. 56 (1948)*. Mr. Justice Jackson, in the majority opinion in the *Maggio* case, stated that the opinion was not

inconsistent with the opinion in *Oriel v. Russell, 278 U. S. 358 (1929)*. The opinion in the *Maggio* case merely modifies the *Oriel* decision by holding that in contempt hearings arising from non-compliance with turnover orders, evidence of present ability to comply may be heard.

But if this decision is to be construed by the courts as meaning that the presumption of present possession from proof of prior possession is to be abandoned or weakened to the point that no burden exists on the relator to prove disposition of the assets, the ability of trial courts to accomplish the ends prescribed by the Bankruptcy Act will be reduced to a great degree.

As said in the opinion in *Maggio v. Zeitz, 333 U. S. 56*, "criminal prosecutions do not recover concealed treasure. And the Trustee, as well as the Court, is commanded to collect the property."

The opinion of the Court of Appeals here is in conflict with the cases cited, and is, we submit, a misapplication of the principles set forth in the *Maggio* case.

2. The Court of Appeals misconstrued the holding of the Trial Court.

The decision of the Court of Appeals in this case stands upon the premises that the language of the Referee in his certificate to the District Court upon the petition for review "clearly negatives" a finding that Shideler was in possession or control of the fund when the show cause order issued and when the turnover order issued.

The language of the Referee is quoted in a footnote in the opinion (R. 265) as follows:

> "In discovering who had possession of the property, the rule and presumption of evidence of recent possession is invariably involved, and when a known state of facts are shown to exist, as in this case, the receipt of the money, $15,000.00, by Hal Shideler on June 25, 1952, when he made deposit of it in the Citizens National Bank of San Bernardino, California, in his individual name, coupled with his direct testimony that on the date of the first hearing, October 2, 1952, he had about $3,000.00 of it, and again on the final date of the hearing, October 9, 1952, that he had only a few hundred dollars of it, is amply sufficient to warrant by clear and convincing proof that on the date the show cause order was issued, July 17, 1952, twenty-three days after he had deposited it in the bank to his personal credit, that he still had the same except for his own wilful and deliberate action of disposing of it, with the intent to rely upon the defense of inability to comply with the order."

The above language of the Referee was not intended as a direct finding of fact, but in support of his conclusions of law in an effort to demonstrate the contumacious attitude of Shideler.

This general language cannot overcome a definite finding of fact by the Referee to the effect that Shideler possessed the fund. (R. 15.) Shideler himself had admitted possession of between two and three thousand dollars of the funds on October 2, 1952, and $1,090.00 of the funds on October 9, 1952. (R. 201.) The turnover issued the next day, October 10, 1952. Shideler admitted possession of

$3,800.00 at the time the order issued adjudging him in contempt. (R. 239.)

In view of Shideler's admission of possession of these funds at the time of the turnover proceedings and the hearing on contempt and in view of the Referee's clear-cut finding of present possession, it is difficult to understand how the Court of Appeals could hold that the Referee found Shideler had disposed of *all* of the funds.

CONCLUSION

For the reasons stated, this petition for a writ of certiorari should be granted.

Respectfuly submitted,

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January ....., 1954.

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IN THE

Supreme Court of the United States

October Term, 1953

No. .....

WILLIAM J. ROCHELLE, JR., Trustee, LIBERTY BROADCASTING SYSTEM, INC., No. 4333 in Bankruptcy,

Petitioner,

vs.

HAL SHIDELER,

Respondent.

Reply to Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.

Hal Shideler, respondent, prays that certiorari be denied herein in connection with the judgment of the United States Court of Appeals for the Fifth Circuit entered in the above entitled case on September 9, 1953, rehearing denied October 26, 1953. The decision of the United States Court of Appeals for the Fifth Circuit reversed the judgment of the United States District Court for the Northern District of Texas.

The Opinion of the Court of Appeals.

The opinion of the Court of Appeals [R. 262-267] is reported in 207 F. 2d 95. Reference to the reasons supporting this opinion is contained below.

Question Presented.

The question presented as outlined on page 2 of the petition of petitioner is considerably broader than is justified by the decision of the Court of Appeals. The Court of Appeals in the next to last paragraph of its decision expressly stated:

> "Since we are of the opinion that the turnover order was improvidently issued for the reasons stated, we need not consider the sufficiency of the evidence to sustain the finding that the fund in question was the property of the bankrupt."

It was the contention of Shideler as confirmed in the facts stated by the Court of Appeals in its opinion that Shideler was agent for Rutledge and Shideler and not for Liberty Broadcasting System, Inc., or the Trustee in Bankruptcy. Nor did the relator meet the "evidence of recent possession" with only a naked denial but to the contrary, as indicated in the statement following, expressly stated how the money had been disposed of and what amount was left. The turn over order did not require the relator to turn over to the trustee in bankruptcy the portion of the fund which remained in his hands but to the contrary ordered him to deliver the entire $11,722.50 fund a majority of which had without conflict been paid out by relator in satisfaction of debts incurred in the prosecution of the enterprise out of which the controversy arose.

Statement.

Respondent vigorously disagrees with certain of the matters set forth in petitioner's statement. Respondent contended throughout the entire hearing before the District Court that the fund of $11,722.50 was not an asset of the bankruptcy estate and that the debt which gave rise

to said fund was one due from Amana Refrigeration, Inc., to the respondent and in which Liberty Broadcasting System had no interest. [Tr. p. 170.] Respondent contended that the monies paid by Liberty Broadcasting System admittedly by check payable to respondent was the exclusive property of respondent and that, contrary to the present claim that Liberty Broadcasting System had an interest therein, respondent held claims arising out of the transaction against Liberty of a far more substantial amount than the payment which respondent had received from Amana. [Tr. p. 170.] Respondent denied that an agreement had been reached between Benton Paschall and respondent on behalf of the bankrupt for the payment of any sum from Amana to Liberty. [Tr. p. 143.] Respondent denied that he had ever asked the trustee for a release. [Tr. pp. 144, 151.] Respondent denied that he ever saw the release to Amana. [Tr. pp. 144-145.] The evidence is uncontroverted that Amana delivered its check for $15,000.00 directly to Shideler, payable to the order of Shideler, and without any direction or request that said check or any part of the proceeds thereof be delivered to Liberty. [Tr. pp. 168, 101, 145.] Shideler testified affirmatively that the check he received from Amana was deposited in his account and that the entire amount thereof belonged to him and had no relation to any claim or alleged claim of Liberty against Amana. [Tr. pp. 169, 179.] On the contrary that said sum constituted a settlement between Amana and Shideler to help defray some of the losses which Shideler had incurred as a result of Liberty's default under its insertion order with Rutledge & Shideler Agency. [Tr. p. 152.] Shideler did testify that he had a small residue of the fund still in his possession but stated that the balance thereof had been used to pay bills and debts incurred by him in the prosecution of the

abortive Amana transaction. [Tr. p. 152.] He gave an express accounting of the approximate amount in his possession left from this fund stating on October 9, 1952, that the only amount which he had left was $1,090.00. [Tr. p. 190.] In spite of this positive showing of (1) assertion by Shideler that the fund was his individual property in which Liberty had no interest, and (2) his positive testimony that the money had been properly expended in connection with this transaction and not for any personal needs of Shideler [Tr. pp. 195, 150, 152], the referee nevertheless made an order directing Shideler to perform an act which was impossible of performance and upon default of performance of the impossible the District Court adjudged Shideler in contempt, ordered him committed and placed in custody. Shideler filed for consideration with the court at the hearing on the contempt his affidavit detailing all of his assets and offering to submit the same to a restraining order against disposition in order to demonstrate his good faith. [Tr. pp. 235-239.]

Reasons for Denying the Writ.

1. The decision of the Court of Appeals is in direct conformity with a decision of the Supreme Court.

The Court of Appeals based its decision largely upon the case of *Maggio v. Zeitz*, 333 U. S. 56, 64. The Court of Appeals stated in the course of its decision:

> "The primary condition upon which a turnover order may be issued is the possession of *existing property* or its proceeds *capable* of being surrendered by the person ordered to do so. A turnover proceeding is not appropriate if, at the time, it is instituted, *the property or its proceeds have already been dissipated, no matter when the dissipation occurred.* Maggio v. Zeitz, 333 U. S. 56, 64." (Emphasis ours.)

The Court of Appeals went on to observe that the presumption of continued possession has no application and may not be relied upon to show present possession in the face of a finding that the respondent did not have the property or its proceeds at the time of the turnover proceedings.

The evidence is without conflict that prior to the institution of the turnover proceedings Shideler had disposed of the fund not by dissipation but through the payment of lawful debts incurred by him in the prosecution of the enterprise out of which the settlement between Amana and Shideler grew. The Court of Appeals, however, observed that even if Shideler had obtained the property of the bankrupt by improper means and then converted it to his own personal use, that his conduct would be inexcusable but that would not be a matter to be dealt with in a turnover proceeding. The Court of Appeals then quoted from *Maggio v. Zeitz, supra,* as follows:

> "Conduct which has put property beyond the limited reach of the turnover proceeding may be a crime, or, if it violates an order of the referee, a criminal contempt, but no such acts, however reprehensible, warrant issuance of an order which creates a duty impossible of performance, so that punishment can follow."

The fears expressed by the petitioner concerning the effect of the decision of the Court of Appeals are based upon false premises. Certainly it has never been the effect of decisions approved by the Supreme Court of the United States to require a respondent to perform an act which on the face of the uncontroverted evidence is impossible of performance and then to suffer imprisonment

for wilful failure to comply with an act which is beyond the power of the respondent to perform.

The opinion of the Court of Appeals is in direct support of the previous expression of the United States Supreme Court and is, we submit, a proper application of the principles set forth in the *Maggio* case.

2. The Court of Appeals properly construed the holding of the Trial Court.

The very language of the referee's finding clearly demonstrates and affirmatively states that on October 2, 1952, the date of the first hearing, Shideler had about $3,000.00 of the initial fund and that on October 9, 1952, on the final date of the hearing he had only a few hundred dollars of it. To follow such a finding under the law and the expressions contained in the decision it would necessarily be ground for reversal of the turnover order which required Shideler to deliver to the trustee a fund in excess of $11,000.00 when his possession by the language of the referee at the time of the order was limited to "a few hundred dollars."

The petitioner now seeks to excuse the language of the referee which is contained in a direct finding of fact in order to supply a finding which would be essential to sustain the turnover order and the subsequent contempt. An examination of the transcript would clearly demonstrate that no other finding could have been made by the referee except to the effect that Shideler did not at the time of the turnover order have the fund in his possession. Certainly had the referee ordered Shideler to deliver to the

trustee all the fund remaining in his hands a different question would have been presented. He was not, however, ordered to do anything less than to turn over the entire fund and when he conclusively demonstrated himself to be incapable of performance he was placed in jail where he was held until released on bail pending the decision of the Court of Appeals.

The petitioner seeks to excuse and to brush aside the specific finding of the referee that Shideler did not have the fund in his possession by another finding wholly unsupported by and contrary to the evidence.

The petitioner seeks to misconstrue the uncontroverted evidence of Shideler. Shideler freely admitted possession of $1,090.00 of the fund on October 9, 1952. This was all of the fund that he then had. The rest had been paid out for debts incurred in the prosecution of the enterprise. In spite of this fact the court issued its turnover order the next day requiring Shideler to perform an impossibility. When subsequently Shideler was cited for wilful failure to comply with the court's order he filed an affidavit with the court in which he listed every asset in his possession including the residue of the fund and the total amount of money which he then had was $3,800.00 although only $1,090.00 of the same constituted a portion of the fund in question. His offer contained in his affidavit to submit all of his assets to an impounding order is a clear demonstration of his good faith and lack of contumacious attitude.

Conclusion.

For the reasons stated, the petition for writ of certiorari should be denied.

Respectfully submitted,

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